Small Business Forest Enterprise Program
FDP for Southeast Vancouver Island

Complaint Investigation 010298

FPB/IRC/74

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The Investigation

The Carmanah Forestry Society submitted a complaint to the Forest Practices Board on February 27, 2001, about the 2000-2004 forest development plan (FDP) for the Cowichan operating area under the South Island Forest District Small Business Forest Enterprise Program (SBFEP). On March 22, 2001, the Sierra Club of British Columbia (Sierra Club) asked the Board to pursue an administrative review of the same FDP. The Board declined that request, but decided to investigate the Sierra Club's concerns as part of this complaint investigation. The Board also received a complaint from Shawnigan Lake Watershed Watch in May 2001, part of which concerned a similar issue. The Board decided to include the relevant part of that complaint in this investigation.

Issues raised in the complaints

All three complainants are concerned that the FDP does not provide for biodiversity and endangered species on the southeast coast of Vancouver Island. The area consists of pockets of Crown forestland surrounded by private land. The complainants assert that government has little control over private land. They maintain that the remaining public land in the area should be managed for forest resources such as water, wildlife and biological diversity. If that principle applies, they argue that the district manager could not have been satisfied that the forest resources were managed and conserved by the FDP because public land is such a small part of the FDP area. Therefore, the complainants maintain that the district manager should not have put the FDP into effect. At the request of the Sierra Club, this issue includes consideration of whether or not the FDP addresses an area of sufficient size.

The Sierra Club was concerned that, contrary to section 18 of the *Forest Practices Code of British Columbia Act* (the Act), the district manager sold SBFEP cutblocks before they were identified in an FDP. The complainant also asserted that the review and comment period was not meaningful because the cutblocks were sold before they were proposed as category A cutblocks in the FDP, and made available for public review.

The Carmanah Forestry Society also raised a general concern about two functions of all district managers. District managers are responsible for the SBFEP within their districts. In order to deliver the business goals of the SBFEP, district staff under the supervision of the district manager must prepare FDPs before offering timber for sale. District managers also give effect to FDPs under section 40 of the Act. The complainant is concerned about the potential conflict of interest created by this dual role.

Issues investigated

The Board investigation examined the following issues:

1. Considering biological diversity and wildlife, did the district manager comply with the Code (the Act and regulations) and was the decision to give effect to the FDP appropriate?

2. Could cutblocks that are already sold be shown in the FDP as proposed category A cutblocks?

3 Should district managers give effect to SBFEP FDPs?

Background

Most of the forestland in British Columbia is Crown forestland. Crown forestland and private land included in a tree farm or woodlot licence are subject to the requirements of the Forest Practices Code (referred to in this report as forestland subject to the Code). Unlike the rest of the province, land grants in the 1800s privatized most of the land on southeast Vancouver Island. The majority of this land is private managed forestland and is not subject to most Code provisions. For example, provisions such as strategic planning and operational planning do not apply. Private forestland and private managed forestland are also not subject to cut-control provisions of the *Forest Act*, so they can be logged at any time.

Nevertheless, government maintains some control over private managed forestland through the *Private Land Forest Practices Regulation*, under the *Forest Land Reserve Act*, which regulates forest practices near streams and establishes reforestation requirements. The regulation also allows a designated environment official to establish critical wildlife habitat on private managed forestland, subject to some conditions. Most importantly for this complaint investigation, before establishing critical wildlife habitat on private land, government must first determine that insufficient habitat is available on Crown land. The complainants believe this places an implicit burden on Crown forestland to provide for biodiversity and wildlife requirements and, until those requirements are provided, logging should not be authorized on the remaining Crown land.

The complainants assert that forest resource needs are based on environmental factors, not land tenure, and because government has little control over private managed forestland, it is not reasonable for the government to rely on private managed forestland to provide for forest resources such as water, wildlife and biological diversity. They assert that the district manager instead must be satisfied that all of an area's forest resource needs will be provided by forestland subject to the Code before approving forestry operations on Crown forestland.

Relevant legislation

Forest Practices Code of British Columbia Act

Section 10 - Forest development plans: content

Section 18 - Forest development plans for Small Business Forest Enterprise Program

Section 40 - Giving effect to operational plans prepared by district manager

Section 41 - Approval of plans by district manager or designated environment official

Operational Planning Regulation

Section 1.1 - Criteria for giving effect to operational plans

Section 9 - Area under forest development plans

Section 18 - Map and information requirements for all forest development plans

Section 23 - Transition

Discussion

Considering biological diversity and wildlife, did the district manager comply with the Code and was the decision to give effect to the FDP appropriate?

Compliance with the Code

A district manager can only give effect to an SBFEP FDP under section 40 of the Act if the FDP meets the requirements of the Act and regulations.

Section 10 of the Act requires FDPs to comply with matters specified by regulation. The Board determined that this FDP complied with the specific content requirements of section 18 of the *Operational Planning Regulation* (OPR). Section 10 also requires that an FDP be consistent with any higher level plan. No higher level plan pertained to the area, therefore this FDP did not have to show consistency. As well, section 10 requires that an FDP specify measures that will be carried out to protect forest resources. The FDP contained measures to protect forest resources, paying particular attention to the northern goshawk and marbled murrelet, two identified wildlife species that are strongly dependant on old-growth forests.

The Board considered whether the FDP met the Code definition for "area under the plan." The Sierra Club was particularly concerned that the area was not big enough to address the needs for marbled murrelet. Whether it is marbled murrelet or some other forest resource, the principles for the area under the FDP are the same. Section 10 of the Act requires an FDP to

contain information for the area under the plan. Section 9 of the OPR states, "A person must ensure that a forest development plan addresses an area sufficient in size to include all areas affected by the timber harvesting and road construction or modification operations proposed under the plan."

Forest resources such as wildlife, fisheries, water and biodiversity occur over both private and Crown forestland. An FDP must show how cutblocks and roads will affect forest resources, but section 9 does not require the FDP to include an area large enough to address the habitat needs of a species. Therefore, it is the Board's opinion that the area under the plan was sufficient in size, the plan contained relevant information as required by the Code and, therefore, the FDP complied with the requirements of the Code.

Appropriateness of the district manager's decision

Section 41 of the Act requires that a district manager must approve a licensee's FDP if he or she is satisfied the FDP adequately manages and conserves the forest resources of the area to which it applies. When the complaint was submitted, this test did not apply when district managers give effect to SBFEP FDPs under section 40 of the Act. On March 30, 2001, the Code changed. Now section 1.1 of the OPR requires district managers to be satisfied that forest resources are adequately managed and conserved for the area under an SBFEP FDP.

Although not required to do so at the time, the district manager chose to consider whether the FDP adequately managed and conserved forest resources of the area before giving effect to the FDP. A decision to give effect to an FDP is a discretionary decision. When examining such discretionary decisions, the Board uses the following standard: "Was the decision consistent with sound forest practices, did it achieve the intent of the Forest Practices Code and was it based on an adequate assessment of available information?"

When deciding to put the FDP into effect, the district manager considered the following information relating to the issues raised in the complaints:

Identified Wildlife Management Strategy and Landscape Unit Planning

When standard Code practices cannot provide adequate protection for plants and animals, or plant communities that are at risk, senior government officials can designate those plants or animals as "identified wildlife." The Identified Wildlife Management Strategy (IWMS) was developed to minimize the effects of forest practices on identified wildlife. Wildlife habitat areas (WHAs) and general wildlife measures are established to conserve habitats that are most important for survival of identified wildlife species. The marbled murrelet has been designated as identified wildlife.

The IWMS recommended that WHAs for marbled murrelet overlap old-growth management areas (OGMA). OGMAs are identified during the landscape unit planning process. Overlapping WHAs with OGMAs is recommended to minimize the impact on the timber harvesting land base.

The government released the *Landscape Unit Planning Guide* in March 1999. Chapter 3 explains the technical details of what land contributes to the calculation of old-growth targets for establishment of OGMAs in landscape units. Urban land and private managed forestland do not contribute to the calculation of old-growth targets.

The complainants use the marbled murrelet as an example of why this landscape unit planning policy should not be used for southeast Vancouver Island. The IWMS recommends that 10 to 12 percent of originally suitable habitat for marbled murrelet should be maintained. The complainants argue that this current practice of including only forestland subject to the Code in the calculation of targets means that a much smaller portion of originally suitable habitat will be maintained on southeastern Vancouver Island because forestland subject to the Code is such a small portion of the area.

The FDP considered potential OGMAs on forestland subject to the Code. Potential WHAs for identified wildlife such as marbled murrelets are to be incorporated into OGMAs wherever possible. It is the Board's opinion that the FDP was consistent with policies in the IWMS and the *Landscape Unit Planning Guide.*

Vancouver Island Summary Land Use Plan

The *Landscape Unit Planning Guide* also explains that, although some regional plans are not higher level plans, they should nevertheless be considered by statutory decision-makers when approving operational plans. Strategic planning initiatives deal with broad wildlife and biodiversity issues such as those raised in the complaints. Although the Board has concerns about strategic wildlife and biodiversity issues, the Board's mandate is to assess whether or not operational plans are prepared and approved consistent with the law, policies and strategic planning initiatives.

The government endorsed the Vancouver Island Summary Land Use Plan (VISLUP) in February 2000. The FDP is contained entirely within resource management zone (RMZ) 34 of the VISLUP. The government established some objectives of RMZs in the VISLUP in a higher level plan order, but not the objectives of RMZ 34. Regardless, the VISLUP describes general management objectives for RMZs, including RMZ 34. The general management objectives are to manage these areas under the standard integrated resource management strategies of the Code.

The general management regime for timber in RMZ 34 is, "General Timber Resource Management with opportunities for Enhanced Silviculture." The objective for timber is, "to harvest, regenerate and tend timber resources..." This objective indicates that government intended timber to be harvested within this RMZ. The FDP is consistent with that objective.

The district manager considered VISLUP direction for conservation of biodiversity and use of the timber resource in her decision. Her rationale states:

> I understand the VISLUP provides direction on the designation of OGMAs rather than the objectives related to creation of old-growth forest attributes on large areas of the

limited Crown forest lands on southeast Vancouver Island. The VISLUP clearly provides the government expectation and direction for continued forest harvesting on crown forest lands on southeast Vancouver Island.

For blocks of Crown land greater than 1,000 hectares, the general management regime for biodiversity in RMZ 34 is:

> ...maintain harvest opportunity in second growth by identifying some old growth recruitment areas in early seral forest; recruit mature forest in the mid (>50 years) term, building gradually towards a mature target ranging from 8% in those portions of the zone with Basic Biodiversity Conservation; and 25% in portions with General Biodiversity Conservation; actively create mature and old seral forest attributes through suitable management strategies, such as variable density thinning and/or partial cut silviculture systems...

For blocks less than 1,000 hectares in RMZ 34, the VISLUP direction is that landscape level biodiversity need not be addressed everywhere, only where it is practicable.

Approximately 70 percent of the area in RMZ 34 is in blocks of Crown forestland greater than 1,000 hectares. The VISLUP prescribes approximately 50 percent of the area in RMZ 34 for general biodiversity.

In the FDP, proposed and approved cutblocks were all placed in second-growth timber. The majority of cutblocks were partial-cut silviculture systems or variable-density thinning. Recruiting old-growth patches over the next 50 years is not a function of operational planning; it is a function of landscape level planning. Potential OGMAs were being developed in the landscape unit planning process. No cutblocks were proposed in potential OGMAs. Therefore, the Board considers that the FDP was consistent with the biodiversity objectives of the VISLUP.

For wildlife, the general management regime in RMZ 34 is, "General Wildlife Management," with an overall goal of maintaining the diversity and abundance of native species. The objective is to manage and conserve known wildlife habitat in accordance with the Forest Practices Code and other pertinent legislation. One specific VISLUP strategy for general wildlife management is to manage species at risk in accordance with the Code and Cabinet-approved strategies. The IWMS and *Landscape Unit Planning Guide* discussed above are such approved strategies. Therefore, the Board considers that the FDP was consistent with the wildlife objective of the VISLUP.

Burger report

With respect to managing for marbled murrelet habitat, the district manager considered a report by Dr. Alan Burger, a recognized authority on marbled murrelet.

The district manager noted:

> ...most of the suitable stands for marbled murrelet habitat were located in the Greater Victoria Water Supply Area, the Sooke Hills Wilderness Regional Park, Weyerhaeuser

private land and Englishmen River Provincial Park. I note that the 2000-2004 Cowichan FDP identifies measures to protect marbled murrelet resources reflecting Dr. Burger's assessment report comments.

The FDP identified recommendations from the study and explained how the FDP was consistent with the recommendations that fell within the scope of operational planning. The recommendations and response are summarized as follows:

1. Preserve old-growth forest suitable for marbled murrelet nesting.

   The FDP identified that the cutblocks in the study area were not in old-growth stands that are suitable for nesting.

2. Establish buffers around suitable old-growth stands.

   The FDP identified that there were no old-growth stands suitable for nesting adjacent to cutblocks, so buffers were not necessary.

3. Recruit older second growth for marbled murrelet habitat.

   The FDP explained that this recommendation is outside the scope of operational planning, but that OGMAs and marbled murrelet WHAs are being developed in the landscape unit planning process.

4. Minimize activities within 500 metres of suitable stands.

   The FDP identified that no cutblocks are planned with 1.1 kilometres of any nest site identified in the study. However, the FDP noted that vehicle traffic on established roads may come within 500 metres of suitable stands.

5. Minimize activities like camping and picnicking that could attract corvids within one kilometre of suitable habitat.

   The FDP identified that this recommendation is outside the scope of operational planning.

The Board considers that the FDP was consistent with Dr. Burger's report.

Request for marbled murrelet WHA

On September 11, 2000, staff of the Ministry of Environment, Lands and Parks (MELP, now Ministry of Water, Land and Air Protection) sent a letter to the district manager commenting on the FDP. They recommended that one cutblock be changed to category I. MELP staff explained that there were few opportunities to recruit old growth in that area; therefore, they did not want that cutblock to be approved and asked the district to consider that area as a voluntary area of interest for a potential marbled murrelet habitat area. After meeting with MELP staff, the district manager determined that the area had less than the preferred conditions recommended in the IWMS for marbled murrelet habitat and declined to change the cutblock to category I.

The Board considers that it was appropriate for the district manager not to change the cutblock to category I.

Summary

The FDP contained the information required by the Code and addressed an area of sufficient size. It did not conflict with potential OGMAs or with sensitive ecosystems and was consistent with the IWMS and the *Landscape Unit Planning Guide*. The district manager decided that the area MELP requested for a voluntary marbled murrelet wildlife habitat area was not well suited to be preserved for adequately managing and conserving those values in the area. She was aware of Dr. Burger's report regarding marbled murrelet habitat on southeast Vancouver Island, and that the FDP was consistent with management recommendations in that report.

The objectives of RMZ 34 of the VISLUP are not higher level plans, but the district manager used them for guidance. The FDP was consistent with biodiversity, wildlife and timber objectives for RMZ 34, as specified in the VISLUP.

The Board considers that the district manager had adequate and relevant information before a decision was made to put the FDP into effect. The decision was consistent with sound forest practices and achieved the intent of the Code. Therefore, the Board considers that it was appropriate for the district manager to be satisfied that the forest resources of the area to which the FDP applied were adequately managed and conserved by the FDP.

Could cutblocks that are already sold be shown in the FDP as proposed category A cutblocks?

The Sierra Club noted that section 18 of the Act restricts sale of cutblocks that are not identified in an FDP.

The Code does not require FDPs to show if a cutblock has been sold. However, the harvest summary table from the proposed 2000-2004 FDP showed that, of approximately 80 cutblocks in the FDP, 18 were proposed category A cutblocks identified as timber sale sold.

The FDP was the first for the Cowichan operating area following the introduction of new regulations that created categories of cutblocks. Section 23 of the new OPR allowed cutblocks that met certain conditions at the time the FDP was given effect, to be grandparented as category A cutblocks. However, at the time the SBFEP advertised the review and comment period for the FDP, some cutblocks did not meet the provisions of section 23 of the OPR, so they were proposed category A cutblocks.

Between the date the FDP was advertised and the date it was put into effect, 7 of the original 18 cutblocks met the requirements of section 23 of the OPR. Therefore, those seven cutblocks were grandparented as category A cutblocks. Three cutblocks continued to be proposed category A. The remaining eight cutblocks were changed to category I and thereby removed from the FDP.

Section 18 of the Act

Section 18 of the Act prevents the government from selling timber unless the cutblocks are identified in an FDP. In this case, the cutblocks had been shown in the previous FDP. They were part of a multiple-year value-added bid proposal and had been sold while the previous FDP was in effect. This was possible because the FDP bridged the transition from cutblocks without categories to categorized cutblocks. Therefore, even though the cutblocks were proposed category A on the initial submission of the FDP, at the time they were sold, they met the requirements of section 18 of the Act.

Meaningful review and comment

In their review comments, MELP staff asked, "How can there be an opportunity for meaningful agency, public and First Nations review of plans if the SBFEP has already sold the block?" They recommended that such cutblocks be assigned category I status.

The cutblocks had previously gone through an FDP review and comment process. Therefore, the cutblocks had undergone a meaningful review and comment period at that time. Even so, the district manager explained to MELP that, if contractual obligations associated with specific cutblocks allowed further consideration of the comments, the district manager would consider the comments. The district manager was amenable to trading the volume in sold cutblocks for equivalent volume in future approved cutblocks. Of the eight proposed category A cutblocks identified as sold and changed to category I, four were changed to category I as a result of comments submitted by MELP.

In summary, all of the cutblocks had already been included in previous FDP review and comment periods. The district manager did accept comments and changed eight of the cutblocks to category I. Therefore, it is the Board's opinion that the FDP met the review and comment provisions of the Code and that the review and comment process was meaningful.

Should district managers give effect to SBFEP FDPs?

This issue is not specific to this FDP, but common to all SBFEP FDPs.

Section 40 of the Act allows the district manager to give effect to an SBFEP FDP prepared by district staff. The complaint asserts that the responsibilities for preparing FDPs and for approving FDPs for the SBFEP should be separated. That way, the apparent conflict of interest between district managers' responsibilities to meet production goals of the SBFEP and to approve FDPs would be avoided.

Principles of administrative law require that a statutory decision-maker must not appear to be biased, in a conflict of interest, or unduly influenced by policies. The dual role of the district manager in administering the SBFEP and giving effect to operational plans for the SBFEP could create an appearance of conflict. However, the legal principle against conflict is overcome by clear statutory authorization. Section 18(4.1) of the Act specifically refers to the district manager preparing an FDP for the SBFEP. Section 40 of the Act specifically authorizes the district

manager to also give effect to an FDP. There is clear statutory language, so it is appropriate for district managers to both prepare and put SBFEP FDPs into effect. The legislature intended that the district manager play a dual role in FDPs for the SBFEP, in preparing them and putting them into effect.

Conclusions

1. The Board concludes that the FDP met the content requirements of the Code. It was appropriate for the district manager to conclude that the forest resources of southeast Vancouver Island were managed and conserved when the district manager put the FDP into effect.

2. The cutblocks identified as sold in the FDP met the requirements of section 18 of the Act. There was an opportunity for meaningful review and comment on the cutblocks that had been sold.

3. The Code specifically authorizes district managers to both administer the SBFEP and to put FDPs under the SBFEP into effect.

Recommendations

In accordance with section 185 of the *Forest Practices Code of British Columbia Act*, the Board makes the following recommendation:

The Board recognizes the complainants' concern about the efficacy of the VISLUP's provisions for biodiversity issues in the context of southeastern Vancouver Island. Therefore, the Board recommends that the Vancouver Island Interagency Management Committee (IAMC) review the effectiveness of the strategy to manage species at risk in accordance with the Forest Practices Code and Cabinet approved strategies in achieving the goal of maintaining the diversity and abundance of native species and their habitats in RMZ 34 of the VISLUP.

In accordance with section 186 of the Act, the Board requests the IAMC to advise the Board of how it is addressing this recommendation by November 30, 2002.